No. 10413

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

ARLEY VIRGLE TUDOR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

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BRIEF FOR THE APPELLEE

FRANK E. FLYNN,
United States Attorney,
District of Arizona.

E. R. THURMAN,
Assistant U. S. Attorney.

Attorneys for Appellee.

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

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STATEMENT OF THE CASE

An indictment was returned on January 28, 1943, charging the appellant with failure to perform a duty required of him under the Selective Training and Service Act of 1940, 50 U. S. C. 311, in that he failed and neglected to report for induction into the land and naval forces of the United States when required to do so by his local Selective Service Board (T.R. 2, 3).

A motion to quash the indictment was denied March 23, 1943 (T.R. 4).

The case was tried to a jury on April 8, 1943 (T.R. 5). Notice of appeal was filed April 19, 1943 (T.R. 6, 7, 8).

The appellant, Arley Virgle Tudor, on October 16, 1940, registered under the Selective Training and

Service Act of 1940, being Title 50 of the United States Code, Chapter 301-311, inclusive, with his Selective Service Board, being Maricopa County Local Board No. 6 (T.R. 19), and was on November 26, 1940, classified as III-A for the reason he was a married man and had children (T.R. 26). Thereafter, on September 30, 1941, he was reclassified in Class I-H, which at that time was a deferred classification given to all men in Class I over the age of twenty-eight (T.R. 26, 27). Subsequent thereto, on February 13, 1942, appellant was reclassified I-A (R.T. 13), and thereafter, on April 21, 1942, he was notified by his said Board to report on May 8, 1942, for induction into the land or naval forces of the United States (R.T. 27). Appellant failed to report (R.T. 22).

Appellant did not deny that the Local Board had jurisdiction over him, that he was not deprived of any procedural rights, that he received the appropriate notices of his classifications or of his order to report for induction, or that he failed to respond to the order. He sought, however, upon cross-examination of the Government's witnesses and through his own witnesses, to show his classification was erroneous.

QUESTIONS PRESENTED

1. Whether the indictment is defective.

2. Whether the Court erred in the admission of certain evidence.

3. Whether the Court erred in permitting testimony of a certain Government witness.

4. Whether the Court erred in instructing the jury.

SUMMARY OF ARGUMENT

In answering appellant's argument we will discuss the points raised in the order in which they are taken up in Appellant's Brief.

ASSIGNMENT OF ERROR NO. I

This assignment has to do with the sufficiency of the indictment. That an indictment must charge each and every essential element of an offense is a well established principle of law. The authorities cited by appellant (App. B. 6, 7) merely reaffirm this principle.

In *Harris v. United States, 104 Fed. 2d 41,* cited by appellant, the indictment was not in the wording of the statute and failed to allege an important element of the offense, namely, that the false entry was made in any record which defendant was required to keep in connection with his official duties.

In *United States v. Britton, 107 U. S. 655* (App. B. 7), the indictment failed to plead an exception stated in the enacting clause of the statute. No such question is raised in the present case.

The other cases cited by appellant on this point state correct principles of law but are not helpful in the application of the law to the present case. The indictment in question contains allegations of all the elements of the crime. It alleges that appellant registered under the Selective Training and Service Act of 1940, that he was classified by the Board as I-A, that he was a person liable for training and service under the said Selective Service Act, and that he was duly notified by his said Board to report at a specified time and place for induction into the land or naval forces of the United States, and that the action of the said

Local Board was pursuant to the power conferred upon the said Board by the Selective Training and Service Act of 1940. The indictment further states that said Local Board was created in Maricopa County, Arizona, under and by virtue of the provisions of the said Selective Training and Service Act of 1940. The offense charged is that he failed to perform a duty required of him, namely, to report for induction into the land or naval forces of the United States, as required to do by the said notice and order of his said Board.

50 U.S.C. 311.

The offense is directly alleged in the indictment (T.R. 2, 3).

The indictment was sufficient under the provisions of Title 18 U. S. C., Section 556, and the authorities cited in the note. It fully informs the appellant of the nature of the charge so as to enable him to prepare his defense. It was also sufficiently definite to support a plea of former acquittal or conviction against another charge for the same offense.

Moore v. U. S., 128 Fed. 2d 974.

Zuziak v. U. S., 119 Fed. 2d 140 (9 Cir.)

Graham v. U. S., 120 Fed. 2d 543.

Woolley v. U. S., 97 Fed. 2d 258 (9 Cir.)

The general rule is that if the language in the indictment is sufficient to apprise the accused, with reasonable certainty, of the nature of the accusation against him, an indictment drawn in the language is sufficient.

See *U. S. v. Henderson* (C.C.A.D.C. 1941), 121 Fed. 2d 75.

Potter v. U. S., 155 U. S. 438.

Summers v. U. S. (C.C.A. 4, 1926), 11 Fed. 2d 583; certiorari denied 271 U. S. 681.

The indictment in this case certainly follows the language of the statute.

This indictment fairly informs the accused of the charge which he is required to meet and is sufficiently specific to avoid the danger of his again being prosecuted for the same offense. Consequently, it should not be held insufficient.

See *Hewitt v. U. S.* (C.C.A. 8, 1940), 110 Fed. 2d 1, 6.

Hagner v. U. S., 285 U. S. 427, 431.

Beard v. U. S. (App. D.C.), 82 Fed. 2d 837, 840.

The appellant, in his argument on Assignment of Error No. I (App. B. 6), argues that the indictment does not state facts sufficient to constitute a crime or offense and that the indictment failed to state that the Glendale, Arizona, local Selective Service Board acted in accordance with the rules and regulations of the Selective Service System, or that the defendant was subject to the orders made by said Board. We find very little merit in appellant's contention, for the indictment sets forth in clear and concise language that "the action of said local board, as aforesaid, being pursuant to the power conferred upon said board by the Selective Training and Service Act of 1940, and the amendments thereto, and the Rules and Regulations duly made pursuant thereto."

With respect to appellant's contention that the indictment does not contain sufficient facts to show that

the appellant was subject to the orders made by the said Local Board, we wish to call the Court's attention to the allegation in the indictment which reads as follows:

> "Arley Virgle Tudor, * * *, being then and there a person liable for training and service under the Selective Training and Service Act of 1940, and the amendments thereto, and having theretofore registered under said act, * * *."

From a perusal of the indictment and a reading of the cases cited in support of appellee's position, we believe that the indictment is good and that the Court did not err in denying appellant's said motion to quash.

ASSIGNMENT OF ERROR NO. II (App. B. 7)

This assignment has to do with the appellant's objections to the admission in evidence of the Government's Exhibit No. 2, for the reason that the said exhibit, being a Selective Service questionnaire, had not been sworn to as provided by the rules of the Selective Service System.

Appellant claims that the Selective Training and Service Act of 1940, Section 605.1(c), contains certain definite language (App. B. 7).

We have been unable to find any section of the Selective Training and Service Act of 1940 that so provides. Neither have we been able to find or locate in the Selective Service Manual, under Section 605.1(c), any such language. However, we do find, on the back of the questionnaire (Form 40), the language used by appellant in his brief. In other words, the language that appellant attributes to Section 605.1(c) of said Act of 1940 is merely an instruction upon the Selective

Service questionnaire and governed by Section 621.5 of Part 621 of the Selective Service Manual under the general heading of "Questionnaire and General Information," which said section is as follows:

> "621.5 Inadequate Questionnaire. When a registrant's Selective Service Questionnaire (Form 40) omits needed information, contains material errors, or shows that the registrant failed to understand the questions, the local board *may* return the Selective Service Questionnaire (Form 40) to the registrant for correction and completion and direct him to return same so completed and corrected on or before a specified date. While compliance with the instructions upon the Selective Service Qestionnaire (Form 40) is required, the local board should be guided by common sense rather than technicalities." (Italics ours.)

Under the above and foregoing section, the Board could have returned the appelant's questionnaire to him for corerction. However, it was not mandatory. It will be noted that the above section clearly indicates that the Selective Service Board is not to be technical with respect to compliance with the instructions upon the questionnaire, and it is specifically set forth that the Board should be guided by common sense rather than technicalities. It appears to us that appellant is attempting to take advantage of his own disregard for the instructions with respect to the executon of the questionnaire.

The appellant also states in his argument on Assignment of Error No. II that the Local Board failed to follow the Selective Service Law, and for that reason its orders were invalid, and therefore contends that he cannot be criminally liable for failure to comply with any such invalid order of the Board. However, outside of

appellant's statement that the questionnaire was not properly executed, appellant's general allegations fail to include any other matters or things that the Selective Service Board failed to comply with under the Selective Service law. It will be noted that the appellant failed to request from or file with his Local Board the special form for conscientious objectors, being Form 47 (R. T. 35), which is mandatory under and by virtue of Section 621.3 of the Selective Service Manual, which reads as follows:

> "621.3 Special Form for Conscientious Objector. A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on a Special Form for Conscientious Objector (Form 47) which, when filed, shall become a part of his Selective Service Questionnaire (Form 40). The Local Board, upon request, shall furnish to any person claiming to be a conscientious objector a copy of such Special Form for Conscientious Objector (Form 47)."

Here, again, the appellant attempts to place the burden upon his Selective Service Board, which the law, and the rules and regulations promulgated in accordance with the Selective service Act of 1940, clearly place upon his shoulders, and his alone.

Again, we wish to reiterate that the appellant never availed himself of the appeal allowed by law in cases of this kind (R. T. 14), and, therefore, the registrant cannot come to Court for relief until he has exhausted all available and sufficient administratve remedies.

It seems that the appellant is laboring under the erroneous premise that he may disobey the order of his Selective Service Board, and, when he is placed on trial for the violation, have the Court go into the proposition of whether his Selective Service Board acted

arbitrarily or capriciously. In support of his contention he cites several cases which we have read, but find that they are not in point and are of absolutely no help in determining the issue raised by appellant.

It is the contention of appellee that until the appellant has exhausted all available and sufficient administrative remedies, he will be unable to seek relief before a Court.

See U. S. v. Johnson (C. C. A. 8), 126 Fed. 2d 242-246.

U. S. v. DiLorenzo, 45 Fed. Supp. 590.

Fletcher v. U. S., 129 Fed. 2d 262.

Rase v. U. S., 129 Fed. 2d 204.

We quote the following from the case of *U. S. v. Alois Stanley Mroz* (C. C. A. 7), 136 Fed. 2d 221, decided June 3, 1943:

> "The Act itself (50 U. S. C. A. Sec. 310 (a) (2)) provides:
>
> 'The decision of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.'
>
> "Appellant dwells on lack of a due process hearing, and on arbitrary and capricious action. He seemingly fails to realize that war is realistic, that the emergency requires immediate mobilization of a large manpower; that each case must be handled individually yet speedily. The Act provides for the administrative set up to handle this titanic task expeditiously. Each individual answers his questionnaire, and can supplement it with any other evidence he wishes to present in support of his claimed exemption. If the Board's ruling be adverse to him, he may appeal, * * *."

> "Appelant's clear and unqualified duty was to comply with his draft board's order. He can not 'take the law into his own hands' and render himself invulnerable to consequences. The draft machinery has been legally set up, and it is not for the individual to constitute himself judge of his own case."

From the above and foregoing, we believe that the trial court did not err in admitting Government's Exhibit No. 2 in evidence.

ASSIGNMENT OF ERROR NO. III (App. B. 8, 9)

This assignment of error refers to the testimony of Mr. Thomas Riordan as to what the rules and regulations of the Selective Service System were. The appellant bases his assignment of error on the premise that such testimony could not be regarded as the best evidence and was not admissible (App. B. 8). Appellant contends that such testimony by Mr. Riordan is found on pages 10, 11, 12 and 13 of the Reporter's Transcript. We have searched those enumerated pages of the Reporter's Transcript most thoroughly but have been unable to find where Mr. Riordan testified as to what the rules and regulations of the Selective Service System were, other than the following, commencing with line 24 at the bottom of page 10 of the Reporter's Transcript:

> "A He was, he was reclassified on September 30th, 1941. At that time we had Rules and Regulations that came out that all men who were over the age of 28 years of age should be classified in 1-H, * * *."

And again, at the bottom of page 12, commencing with line 22, Mr. Riordan testified as follows:

> "We received these new Regulations stating that all men classified in 1-H should be reclassified in Class 1, so—."

Mr. Riordan has been the clerk of Maricopa County Local Board No. 6 ever since its inception (R. T. 3), and therefore an executive officer of the Board, and was entitled to testify as to what were the regulations surrounding the registration, classification and other details appertaining to the case of this appellant which were before the said Selective Service Board.

Certainly the Court would take judicial notice of the Selective Training and Service Act of 1940 and the amendments thereto, and the rules and regulations duly made pursuant thereto. In support of this contention, appellee cites the following cases:

Gardner v. Collector of Customs, 73 U. S. 499.

Bellaire, Benwood & Wheeling Ferry Co. v. Interstate Bridge Co., 40 Fed. 2d 323.

Downey v. Geary-Wright Tobacco Co., 39 Fed. Supp. 33.

Caha v. U. S., 152 U. S. 211-222.

Cohen v. U. S., 129 Fed. 2d 733.

In the case of *Gardner v. Collector of Customs, supra,* we find the following language, at page 508 of the opinion:

> "The statute under consideration is a public statute, as distinguished from a private statute. It is one of which the courts take judicial notice without proof, and, therefore, the use of the words 'extrinsic evidence' are inappropriate."

And at the top of page 509, we find the following:

> "The judicial notice of the court must extend, not only to the existence of the statute, but to the time at which it takes effect, and to its true construction."

We quote from *Downey v. Geary-Wright Tobacco Co., supra,* as follows:

> "The federal district court must take judicial notice not only of provisions of Agircultural Adjustment Act but of all rules and regulations made and promulgated under its authority."

We find in the case of *Cohen v. U. S., supra,* that the district court could take judicial notice of federal statutes and regulations of the Works Progress Administration.

We believe that the case of *Caha v. U. S., supra,* commencing at the bottom of page 221, clearly states the rule, and we quote:

> "Another matter is this: The rules and regulations prescribed by the Interior Department in respect to contests before the Land Office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in

pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

We believe the above and foregoing cases clearly show the Court committed no error in permitting the witness to testify with respect to the regulations promulgated under and by virtue of said Selective Training and Service Act of 1940, for his testimony could not have been prejudicial to the appellant in any degree.

ASSIGNMENT OF ERROR NO. IV (App. B.9)

This assignment refers to the instructions of the Court to the jury, and has for its basis that the trial court erred in instructing the jury that even if a Local Draft Board acted in an arbitrary and capricious manner, or denies a registrant a full and fair hearing, nevertheless the registrant must comply with the Board's orders and then defend his dereliction by collaterally attacking the Board's administrative acts. We believe that the judge's instruction, claimed as error by appellant in this case, correctly states the law (R. T. 57, 58), and in support of the instruction we cite the following cases:

U. S. v. Johnson (C. C. A. 8), 126 Fed. 2d 242-246.

U. S. v. Grieme (C. C. A. 3), 128 Fed. 2d 811.

Rase v. U. S. (C. C. A. 6), 129 Fed. 2d 204.

U. S. v. Kauten (C. C. A. 2), 133 Fed. 2d 703.

U. S. v. Grieme, supra, states the law appertaining to cases of this nature in this very able language:

"The registrant may not, however, disobey the Board's orders and then defend his dereliction by

collaterally attacking the Board's administrative acts."

Also, in *Rase v. U. S., supra,* we find this language:

"No power to review any classification, or the denial of an exemption, is conferred upon the courts."

We quote from *U. S. v. Kauten, supra,* as follows:

"Indeed it has become the general rule that where Congress has delegated to an administrative authority a certain field of governmental activity and made its acts final, the courts will not interfere until the administrative proceedings have been concluded and any administrative remedy that may exist has been exhausted. Under this rule there would seem to have been no good reason for interrupting proceedings leading to induction until some substantial physical restraint occurred. Then the writ of habeas corpus is sufficient to remedy any irregularities of Draft Boards and to satisfy all reasonable scruples on the part of inductees. Moreover, it is the practice of the Army to grant a furlough of seven days after a registrant is formally inducted before he is subject to military training. This gives him time to apply for a writ of habeas corpus without disturbing the selective service machinery, if he thinks that his rights as a conscientious objector have been infringed.

"*It results from the foregoing that the registrant was bound to obey the order to report for induction even if there had been error of law in his classification.* The Administrative Board has jurisdiction of his case and its order could not be wilfully disregarded." (Italics ours.)

SUMMARY

The indictment was sufficiently definite to inform appellant of the nature of the charge and to support a plea of former jeopardy.

Appellant had a fair and impatrial trial, and the verdict and judgment should be affirmed.

Respectfully submitted,

FRANK E. FLYNN,
United States Attorney,
District of Arizona.

E. R. THURMAN,
Assistant U. S. Attorney.
Attorneys for Appellee.